United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2049

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA ex rel. JOHN SUGGS,

Petitioner-Appellee,

-against-

J. EDWIN LaVALLEE,

Respondent-Appellant.

- x

On Appeal from the United States District Court for the Southern District of New York (72 Civ. 4336 K.T.D.)

BRIEF FOR PETITIONER-APPELLEE

Judson A. Parsons, Jr.
Attorney for Petitioner-Appellee
140 Broadway
New York, New York 10005
Tel. (212) 344-8000

Of Counsel:

Robert J. Costello

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA ex rel. JOHN SUGGS, Petitioner-Appellee, -against- J. EDWIN LaVALLEE, Respondent-Appellant.	On Appeal from the United States District Court for the Southern District of New York (72 Civ. 4336 K.T.D.)

BRIEF FOR PETITIONER-APPELLEE

Questions Presented

1. Whether the District Court was correct in holding, without a hearing, that the petitioner's 1968 guilty plea was void by reason of the petitioner's incompetence.

2. Whether the District Court correctly held, without a hearing, that petitioner's 1969 sentencing proceedings were an inadequate substitute for a valid plea under the standards of Boykin v. Alabama, 395 U.S. 238 (1969).

Statement

This is an appeal from a decision of Judge Duffy of the United States District Court for the Southern District of New York, dated February 25, 1975 which ordered the petitioner's guilty plea to state charges vacated and a writ of habeas corpus issued within 60 days, unless within that time the petitioner is allowed to replead in the state court. The

District Court found that the petitioner was incompetent at the time he entered his plea of guilty in September 1968 and that the sentencing proceedings in 1969 were not an adequate substitute for a valid plea under the standards set forth in Boykin v. Alabama, 395 U.S. 238 (1969).*

On March 21, 1975 the respondent filed a Notice of Appeal from the decision of the District Court. On March 29, 1975 Judge Duffy signed an order staying his decision pending the taking of an expedited appeal by the respondent. This Court signed an order permitting such an appeal on March 27, 1975.

Facts

The Petitioner is a state prisoner presently incarcerated in the Eastern Correctional Facility serving a 5 to 15 year sentence imposed by a state court on June 6, 1969. On September 13, 1968 the petitioner appeared before Justice Nunez of the Supreme Court of the State of New York, New York County to plead to two indictments, Indictment 3063-68, and Indictment 3063A-68. (Plea Minutes, p. 2)** The petitioner at that time was represented by counsel from the Legal Aid Society. On that date, petitioner's counsel informed the Court that the petitioner wished to withdraw his prior plea

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* Judge Duffy's full opinion is attached as appendix A to this brief since, apparently due to a clerical error, the respondents brief does not contain Judge Duffy's full opinion.

** Plea Minutes will hereafter be cited by the letter "P" followed by the appropriate page number; the Sentencing Minutes will be cited by the letter "S" followed by the appropriate page number.

of not guilty and offered to plead guilty to the crimes of rape in the first degree (under the first count of Indictment 3063-68) and robbery in the first degree (under the first count of Indictment 3063A-68) in full satisfaction of all counts of said indictments. The People recommended acceptance of the petitioner's plea and further recommended that the plea be accepted in satisfaction of Indictment 2251-68. (P.3) The Court further granted the People's motion to dismiss Indictment 3523-68 which referred to the same offenses as Indictment 3063A-68. (P.7)

Following the People's recommendation, a colloquy was held between the petitioner and the Court. During the course of this colloquy, the petitioner responded affirmatively when asked whether he had consulted with his counsel, whether he had heard the facts of his case as related to the Court by the district attorney, and whether his guilty pleas to the two indictments were voluntary and not due to threats or promises. (P.10, 15, 16) The Court accepted the pleas, but thereafter the Court's further questioning produced the following bizarre answers which led to petitioner's commitment to Bellevue Hospital Center.

The Court:	You are not sorry at all that you did any of these things, Mr. Suggs?
The Defendant:	Nothing to be sorry about.
The Court:	What?
The Defendant:	There is nothing to be sorry about.
The Court:	Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.
The Court: No matter what you do?
The Defendant: No matter what I do.
(P.17-18)
* * *
The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?
The Defendant: I tried that once.
The Court: What?
The Defendant: I tried that once.
The Court: You tried that once? When was that?
The Defendant: When I was small.
The Court: What happened when you were small?
The Defendant: I lost a finger because I tried.
The Court: You lost a finger you say?
The Defendant: Part of it.
The Court: What happened then?
The Defendant: That's when I did something when I had a fight with my sister. I wanted to show mother I was sorry. Instead of showing her I was sorry, she cut me.
The Court: Who tried to cut you, your mother or your sister?
The Defendant: My mother.
(P.19-20)

Thereafter the Court made the following significant statement which is not quoted in respondent's brief:

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be --- whom are you mad at?
The Defendant: No one.
(P.21)

It is obvious from this statement that the Court had doubts concerning petitioner's competence and was committing him to Bellevue for a report on his condition as of the date of the plea. Although the defense counsel indicated that he

agreed that such a commitment would help the Court in sentencing, there is nothing in his remark or anywhere else in the record to support respondent's claim that this commitment was solely for sentencing purposes. The commitment was made pursuant to Section 658 of the then New York Code of Criminal Procedure,* a fact which suggests that it was intended to call for a full-scale examination into petitioner's competency to participate in any criminal proceedings.

On October 21, 1968, following a period of six weeks during which petitioner could be observed and tested at Bellevue, Drs. Martin I. Lubin and Laszlo Kedar, two Bellevue psychiatrists, submitted a report which found the petitioner to be a paranoid type schizophrenic who was "in such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense." This report was not qualified in any way, shape or form.

On receipt of this report, the District Attorney

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* That statute reads as follows:

> "If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant indicted for a felony or a misdemeanor that there is reasonable ground for believing that such defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, or if the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity."

had two choices: he could contest it at a hearing or he could agree with it. In this case he chose to waive any hearing* on the report and thereby accepted it as an accurate report. Thereafter, on November 6, 1968 pursuant to Section 662(b)**

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* The order of Justice Gold, dated November 6, 1968, indicates that Assistant District Attorney Bruce Henningsen waived the hearing.

** That Section provides in pertinent part:

1. If, after giving the district attorney and counsel for the defendant opportunity to be heard thereon, the court is of the opinion that the defendant is in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense, the trial or proceedings must be suspended, except as hereinafter provided, until he is no longer in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him and the proceedings and of making his defense, and the court shall commit the defendant to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene or the state department of correction which has been approved by the heads of such departments. If the defendant is not in a hospital as defined in the mental hygiene law, the court shall direct the sheriff, if the court is located in a county outside the City of New York, and the court shall direct the department of correction of the City of New York, if the court is located in the City of New York, to hold the defendant temporarily pending such approval or designation of an appropriate institution in which the defendant shall be placed, and, when notified by the commissioner of mental hygiene of the designated institution, the sheriff or the department of correction, as the case may be, shall forthwith cause the defendant to be delivered to the head of such institution. If the defendant is in a hospital as defined in the mental hygiene law, the defendant shall be temporarily detained therein pending such approval or designation of an appropriate institution by the commissioner of mental hygiene.

2. A defendant so committed may at any time during the period of his commitment be transferred to any appropirate state institution of the department of mental hygiene or of the department of correction, as may be approved by the heads

of the Code of Criminal Procedure, Justice Samuel M. Gold of the Supreme Court signed an order in which he found petitioner to be incompetent to stand trial and committed him to the custody of the Commissioner of Mental Hygiene. This order was a judicial determination that the petitioner was incompetent* and had obviously been incompetent since at least September 13, 1968, the date on which Justice Nunez had committed him to Bellevue Center for the beginning of his psychiatric evaluation. On November 15, 1968, petitioner was committed to Matteawan State Hospital.

Now, on this appeal, we are told for the first time that Dr. Emanuel Messinger, another psychiatrist, signed a report on July 23, 1968 more than seven weeks prior to the plea, stating that although petitioner was of the "pathological per-

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(footnote continued)

of such departments. A defendant so committed shall remain in such institution until he is no longer in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or of making his defense thereto except as hereinafter provided. In that event the director of the institution where such defendant is confined shall inform the court and the district attorney, or their successors, of such fact that the person so confined may be returned forthwith to the authority by which he was originally held in confinement. The court from which such defendant was committed shall cause the sheriff without delay to bring the defendant from such institution and place him in proper custody, whereupon the proceedings against such defendant shall be resumed and he shall be brought to trial or legally discharged.

* See, People v. Hudson, 19 N.Y.2d 137, 278 N.Y.S. 2d 593 (1967).

sonality group, emotionally unstable type, with depressive and paranoid trends" he was "without psychosis". This alleged report did not deal expressly with whether petitioner was competent to plead guilty, be tried or otherwise participate in criminal proceedings.

There is no reason to believe that the Messinger report was withheld from the District Attorney at the time of Justice Gold's adjudication. If the state had any question as to the accuracy of the Lubin-Kedar report, which expressly dealt with the competency question, or as to Justice Gold's reliance upon it, it should and obviously would have raised the question then.* The waiver of the hearing by the District Attorney, which is expressly recited in Justice Gold's Order, indicates that the Lubin-Kedar report was regarded as controlling on the question of petitioner's competency.

On April 4, 1969, the Superintendent of Matteawan filed a report with the Court, certifying that petitioner was "no longer in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him

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* Section 662-a, New York Code of Criminal Procedure, is as follows:

> "The Court shall cause one copy of such report to be served upon the district attorney and one copy upon counsel for the defendant. If either counsel for the defendant or the district attorney does not accept the findings of the psychiatrists and wishes to contravert (sic) them, the court shall afford counsel for the defendant and the district attorney opportunity to do so

or making his defense thereto." The Superintendent's report, containing a history of petitioner's psychiatric background and progress, diagnosed his condition as psychosis with anti-social personality, paranoid and reactive features and noted that because of treatment with psychotropic drugs, petitioner's mental condition had gradually improved. The report stated that at a recent staff presentation, the petitioner was attentive and cooperative and was able to give a coherent and relevant account of the events leading to his arrest.

On the basis of that report, the petitioner was certified as competent on April 4, 1969, and was thereupon returned to court for sentencing. On June 6, 1969, after two further reports, petitioner appeared before Justice Schweitzer for sentencing with newly appointed counsel. Upon being asked by Justice Schweitzer whether there was any legal cause why judgment should not be pronounced at that time, petitioner replied that he was incapable of understanding the case at the time of his original plea. (S.2)

The Court then reiterated to the petitioner that it had previously adjourned the sentencing in order to give petitioner's counsel an opportunity to make any applications he deemed advisable with regard to withdrawing his plea. The Court reminded the petitioner that his attorney had informed the Court earlier that week that the petitioner did not wish to withdraw his plea. (S.3) The Court then inquired of the defendant personally, whether he wished to withdraw his plea

or proceed with sentencing. Petitioner asked to be sentenced and indicated that he did not wish to withdraw his plea. (S. 4) At that point the Court sentenced the petitioner to a term of five to fifteen years without making any inquiry into the voluntariness of the earlier plea or the decision not to move to withdraw it or into the factual basis for the plea. (S.7) There was no inquiry as to whether the petitioner was aware that he was waiving certain Constitutional rights. No hearing on competency was requested or held on this occasion.

Petitioner appealed to the Appellate Division, First Department arguing that a competency hearing should have been ordered sua sponte at the time of sentencing. The Appellate Division affirmed his conviction without opinion. People v. Suggs, 35 App. Div. 2d 781; 314 N.Y.S.2d 981; (1st Dept. 1970). On November 6, 1970, petitioner was denied leave to appeal to the New York Court of Appeals.

Petitioner also filed an application for a writ of error coram nobis in Supreme Court, New York County, again replying on the failure of the Court to order a competency hearing at the time of sentencing. This petition was denied in August 1970, and no appeal was taken therefrom.

On October 13, 1972, petitioner filed a pro se application for a writ of habeas corpus in the United States District Court for the Southern District of New York. He again asserted that the state court, prior to his 1969 sentencing, should have ordered sua sponte a competency hearing.

On June 5, 1972, petitioner's present counsel was assigned by Judge Duffy. On July 19, 1973 by stipulation, the petition was placed on the suspense calendar in order to allow petitioner to return to the state courts and raise the points which were later decided in petitioner's favor by Judge Duffy, which are now at issue in this Court, and which had not been previously raised in the state courts. Petitioner then filed a pro se motion to vacate the judgment on this ground in Supreme Court, New York County. This motion was denied by Justice Sandifer on December 6, 1973. Although he stated that it was "far from clear that defendant was incompetent" at the time his original pleas were taken, he did not purport to set aside or otherwise invalidate Justice Gold's prior adjudication of incompetence. Leave to appeal to the Appellate Division was denied on March 5, 1974.

The Decision Appealed From

On February 25, 1975, Judge Duffy of the United States District Court for the Southern District of New York found that the petitioner's initial guilty plea was void since it was entered at a time when the petitioner was incompetent. In so holding, the Court found that there was a judicial determination that the petitioner was incompetent as of September 13, 1968 and that therefore any guilty plea entered on that date was void under Pate v. Robinson, 383 U.S. 375 (1966). Further, the Court determined that the petitioner's 1969 sentencing was not a valid substitute for a guilty plea since the

State Supreme Court did not conduct a full and complete inquiry into voluntariness as required by Boykin v. Alabama, 395 U.S. 238 (1969). The District Court found that pursuant to Boykin, there must be an affirmative showing of a explicit waiver of the defendant's constitutional rights and that in the instant case the record was silent as to any waiver of those rights by petitioner at any time during which he was competent. The District Court did not hold an evidentiary hearing because there was no basis for any factual dispute on the record before that Court.

SUMMARY OF ARGUMENT

The question of whether the petitioner was incompetent at the time of his 1968 plea was conclusively determined by the state court order of Justice Gold. Therefore, the District Court correctly determined that the petitioner's 1968 guilty plea was void.

Since the 1968 plea was void, the 1969 proceedings must be viewed as a plea de novo. That "plea" was invalid since it failed to comply with the requirements of Boykin v. Alabama, 395 U.S. 238 (1969) in that Justice Schweitzer made no inquiries of the petitioner as to whether he understood he was waiving his constitutional rights; as to the voluntariness of the plea; or as to whether there was a factual basis for the plea.

The District Court was correct in declining to hold

an evidentiary hearing in this case. There were no factual disputes to be resolved.

POINT I

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT PETITIONER'S 1968 PLEA WAS VOID BECAUSE OF THE PRIOR ADJUDICATION THAT PETITIONER WAS INCOMPETENT.

It is settled law that a defendant who pleads guilty to a charge must do so voluntarily after proper advice and "with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220 (1927). A guilty plea operates as a conviction. Kercheval v. United States, supra. The conviction of an accused person while he is legally incompetent violates due process, Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). As the Court stated in McCarthy v. United States, 394 U.S. 459, 466 (1969):

> ". . . [I]t must be an 'intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." (Emphasis added)

Similarly the New York Court of Appeals in People v. Boundy, 10 N.Y.2d 518, 225 N.Y.S.2d 207, stated:

> "Of course, if he was mentally incompetent at the time of his plea the judgment was void. . ." Id. at p. 520.

Moreover, the colloquy surrounding petitioner's void guilty plea - including any inquiry by the court into whether

the plea was voluntary - was also of no legal significance and was in fact a nullity since an incompetent defendant cannot be bound by any such proceedings. As the Supreme Court said in an analogous situation:

> ". . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, supra, 383 U.S. 375 at 384.

In the present case petitioner was adjudicated as an incompetent by the state court. Consequently, under the foregoing principles, his plea in 1968 and all of the statements made at the time thereof were a complete nullity.

Respondent now seeks to circumvent the adjudication by claiming that there is an issue of fact as to the petitioner's competence at the time of his original plea on September 13, 1968 because of an alleged psychiatrist report dated July 23, 1968 which was never shown to the court below. However, there is nothing to show that this report was in any way withheld from or not freely available to the district attorney at the time he waived the hearing on the Lubin-Kedar recommendation and thereby consented to Justice Gold's adjudication that petitioner was incompetent to stand trial. It is now simply too late for respondent to second-guess the district attorney or to use these proceedings as a means of circumventing this formal adjudication. See, People v. Hudson, supra.

In any event, even apart from Justice Gold's formal adjudication, the alleged July 23, 1968 report could not raise

an issue of fact. It speaks of an examination, into whether petitioner was psychotic, by one psychiatrist following a period of observation of unstated length ending over seven weeks before petitioner's plea. It does not purport to decide whether petitioner was competent to be tried -- an issue quite different from the general question whether petitioner was psychotic or was suffering from such mental disease or defect at the time of his alleged crimes as to escape responsibility for them.*

The incompetence of petitioner at the time of his plea was reported by two Bellevue psychiatrists after petitioner was committed to Bellevue for the express purpose of obtaining such a report. The period during which petitioner could be observed and tested by these psychiatrists began immediately after the plea. The commitment itself was the result of the

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* As the Court stated in People ex rel. Butler v. McNeill, 30 Misc. 2d 722, 219 N.Y.S.2d 722, 725, (Sup. Ct. Dutchess Co. 1961):

> "The test of mental capacity which the law imposes upon a person accused of crime to determine whether he is capable of standing trial may be simply stated: Does the accused have possession of such mental faculties as to be able to understand the nature of the charge or of making his defense. See sec. 1120, Penal Law; sec. 662-b, Code of Criminal Procedure. That test differs considerably from the test prescribed for legal responsibility for the crime charged, and from the test prescribed for the capacity to be punished, after conviction, and from the test prescribed for disposition of the accused after acquittal." (footnotes omitted)

bizarre behavior of petitioner at the time of the plea, which led the court to conclude sua sponte that there was "something wrong" with petitioner and that he should be examined (P. 21). The Lubin-Kedar report was accepted by counsel for both sides and by Justice Gold. In the court below, respondent conceded the invalidity of petitioner's plea, stating:

> "Of course, were it not for the subsequent events, the guilty plea entered on September 13, would not furnish a basis for a conviction as it was not knowingly or intelligently entered into." (Respondent's Supplemental Memorandum, p.12.)

Under these circumstances, the alleged earlier report is of no factual significance and Judge Duffy correctly held that an evidentiary hearing was unnecessary. Townsend v. Sain, 372 U.S. 293 (1963); Noorlander v. United States Attorney General, 465 F.2d 1106 (8th Cir. 1972) cert. denied 410 U.S. 938 (1973); United States ex rel. Burke v. State of Illinois, 465 F.2d 268 (7th Cir. 1972).

POINT II

THE DISTRICT COURT CORRECTLY HELD THAT THE 1969 PROCEEDINGS WERE NOT AN ADEQUATE SUBSTITUTE FOR A VALID PLEA.

Since the 1968 plea was void, petitioner should have been given a new chance to plead when he was allegedly restored to competence in 1969. At the very least, his decision not to move to withdraw his prior plea should have been subject to all safeguards necessary for the original entry of a guilty plea. In the present case, the 1969 proceedings are defective because the state court made absolutely no inquiry of the petitioner as to whether his prior plea (or his decision not to move to set it aside) were voluntary, or whether the petitioner was aware that he was waiving the important constitutional rights of a criminal defendant. Nor was there any inquiry as to whether there was a factual basis for the plea as required in United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974).

Four days prior to the date of the petitioner's sentencing, the Supreme Court decided in Boykin v. Alabama, 395 U.S. 238 (1969), that it is a violation of due process for a state court to accept any guilty plea unless the record plainly shows that an inquiry into voluntariness has been made and that appropriate answers have been obtained before the plea is entered. The Supreme Court specifically enumerated that among the rights waived by a defendant who pleads guilty are the right to a jury trial, the right to confront his accusers,

and the privilege against self-incrimination. Id. at 243. The Court stated that waiver cannot be presumed from a silent record, holding that the prerequisites of a valid waiver must appear on the record:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." Id. at 242.

record at the time of petitioner's sentencing or at any other time during which petitioner was competent, Judge Duffy correctly held that petitioner's incarceration was unlawful and was required to issue the writ.

Respondent attempts to circumvent the clear rule of Boykin by arguing that the validity of petitioner's incarceration should be measured not by the standards of Boykin but rather by the more lenient standards applied before the Boykin decision and cites United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970), cert. denied 404 U.S. 834 (1971) and United States ex rel. Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970). However, both of these cases involved guilty pleas entered several years before Boykin was decided. Since this Court has held that Boykin should not be applied retroactively to such earlier pleas, neither case decided what is required when the plea is taken after Boykin.

The post-Boykin rule was clearly stated by Mr. Justice Harlan in his dissenting opinion in the Boykin case as follows:

"The Court thus in effect fastens upon the States,

as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure." Id. at 245.

This Court reached the same conclusion in dictum, in United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1102 (2d Cir. 1972), where it stated:

> ". . . Judge Lasker's suggestion that no intelligent waiver of constitutional rights was made by Curtis when he withdrew his not guilty plea and pleaded guilty to second degree murder, which appears to be based principally upon the failure of the record to reveal that he was advised of his rights and expressly waived them. Such a procedure, which is required by Rule 11, F.R.Cr. P., in federal proceedings, is preferred and indeed now mandated in state proceedings by Boykin v. Alabama. . . ."

In the present case Judge Duffy correctly held that the sentencing proceedings were no substitute for the proceeding required under those standards.

Conclusion

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: New York, New York
April 25, 1975

Respectfully submitted,

Judson A. Parsons, Jr.
Attorney for Petitioner-Appellee
140 Broadway
New York, New York 10005
Tel. (212) 344-8000

Robert J. Costello
Of Counsel

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
ex rel. JOHN SUGGS,

Petitioner,

-against-

J. EDWIN LA VALLEE, Superintendent,
Clinton State Correctional Facility,
Dannemora, New York,

Respondent.

OPINION

72 Civ. 4336

#41945

APPEARANCES:

JUDSON A. PARSONS, JR., ESQ.
Attorney for Petitioner

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
By: Stanley L. Kantor, Esq.
Deputy Asst. Attorney General
Of Counsel

KEVIN THOMAS DUFFY, D.J.

The petitioner, a state prisoner presently incarcerated in the Auburn Correctional Facility, makes application pursuant to Title 28, United States Code, Section 2254, for a writ of habeas corpus in order to secure a new trial,

or, in the alternative, an evidentiary hearing, relating to the involuntary nature of his plea of guilty to the crimes of rape in the first degree and robbery in the first degree, in Supreme Court, New York County, for which he was sentenced on June 6, 1969, to two concurrent indeterminate terms of five to fifteen years imprisonment.

I find that petitioner has complied with the requirement of 28 U.S.C. 2254(b) that he first exhaust state court remedies before presenting his claims to the federal courts.

His initial appeal, limited to the issue of his right to a competency hearing at the time of sentencing, was denied by the Appellate Division, People v. Suggs, 35 App. Div.2d 781 (1st Dept. 1970), with leave to appeal to the New York Court of Appeals denied on November 6, 1970.

He also filed an application for a writ of error coram nobis in Supreme Court, New York County, again raising the issue of his right to a competency hearing at the time of sentencing. This petition was denied in August 1970, and no appeal was taken therefrom.

Shortly after the institution of his habeas petition, counsel was assigned by this Court and the Court suspended consideration on the merits until such time as petitioner returned to the state courts to exhaust on the issue

of the sentencing court's failure to afford the colloquy on voluntariness mandated by Boykin v. Alabama, 395 U.S. 238 (1969).

Accordingly, petitioner filed a motion to vacate the judgment in Supreme Court, New York County, which was denied on December 6, 1973, with leave to appeal to the Appellate Division denied on March 5, 1974.

Thus, there has now been a proper exhaustion of state court remedies, 28 U.S.C. 2254(b); both procedurally, Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); and as to the specific subject matter raised in the petition, Picard v. Connor, 404 U.S. 270, 275 (1971); United States ex rel. Nelson v. Zelker, 465 F.2d 1121 (2d Cir.), cert. denied, 409 U.S. 1045 (1972).

The basic question presented is whether petitioner was deprived of due process of law by virtue of the sentencing court's failure to inquire into the voluntariness of his original guilty plea, in light of his having been found incompetent immediately after his initial plea.

Petitioner was originally charged in an eighteen-count indictment with various counts of rape in the first degree, sodomy in the first degree, robbery in the first degree, and possession of a weapon. A second indictment charged him with additional counts of robbery.

In spite of his relative youth (age 17) and lack of a prior criminal record, he was denied Youthful Offender Status on August 1, 1968, and appeared in Supreme Court, New York County, on September 13, 1968, in order to plead to the indictment. Petitioner, represented by the Legal Aid Society, withdrew his prior plea of not guilty and offered to plead guilty to one count of rape, first degree, and one count of robbery, first degree, in full satisfaction of the indictments. The prosecution recommended acceptance of the proffered plea.

Before accepting the plea, the court entered into a colloquy with petitioner as to his understanding of the plea, and as to whether or not there was a factual basis for the plea. During the course of this colloquy, petitioner responded affirmatively when asked whether he had heard the facts of the crimes as related by the District Attorney and he admitted them. He also stated that he had consulted with his attorney. The court at that time asked him whether his guilty plea was voluntary and whether threats or promises were made to induce him to plead. He responded appropriately.

It is to be noted, however, that the court on that occasion made no inquiry whatsoever into whether petitioner understood what specific constitutional rights he would be waiving by pleading guilty. Moreover, there is no indica[illegible]

whatever on the face of the plea minutes that petitioner was ever informed of the potential maximum sentence which might be imposed upon his guilty plea, or of the possibility that he would have to serve a minimum sentence before being eligible for parole. However, in light of this Court's disposition, infra, it is unnecessary to rule upon whether petitioner fully understood the consequences of the plea at that time.

Upon satisfying itself as to the plea's voluntariness, the court thereupon began to inquire into whether petitioner felt any remorse for his acts. After engaging in a bizarre colloquy, reproduced in the Appendix, infra, the court sua sponte, with the consent of petitioner's counsel, ordered him to Bellevue Psychiatric Hospital for a psychiatric examination and report, pursuant to Sec. 658, et seq., of the then-Code of Criminal Procedure (now Article 730, Criminal Procedure Law).

However, the court still accepted petitioner's guilty plea and set October 31, 1968, for sentencing.

Petitioner was committed forthwith to Bellevue and a report to the court was completed on October 21, 1968. The report revealed that petitioner had a long history of behavior problems, including residence at Wiltwyck Treatment Center and Hampton State Training School, and that "His history of behavior reveals that he has characteristically

reacted to feelings of persecution by retaliation." Diagnosing petitioner as suffering from "Schizophrenia, Paranoid Type", the two qualified psychiatrists who examined him found him to be "in such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense." Cf., Sec. 658, C.C.P.

Pursuant to Sec. 662-b, C.C.P., the court, after a hearing, found petitioner incompetent to stand trial and committed him to the custody of the Commissioner of Mental Hygiene on November 6, 1968. On November 15, 1968, petitioner was committed to Matteawan State Hospital.

On April 4, 1969, the Superintendent of Matteawan filed a report with the court, certifying that petitioner was "no longer in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or making his defense thereto." The Superintendent's report, containing a history of petitioner's psychiatric background and progress, diagnosed his condition as Psychosis with Antisocial Personality, Paranoid and Reactive Features. The report stated that at a recent staff presentation, petitioner was attentive and cooperative and was able to give a coherent and relevant account of the events leading to his arrest.

Upon the basis of that report alone petitioner was certified as competent on April 9, 1969, and he was thereupon returned to court for sentencing.

On June 6, 1969, petitioner appeared with newly appointed counsel for sentencing. Upon being asked by the court whether there was any legal cause why judgment should not be pronounced at that time, petitioner replied that at the time of his original plea, he wasn't capable of understanding the case.

The court then reiterated to petitioner that it had previously adjourned the sentencing in order to give petitioner's counsel an opportunity to make any applications he deemed advisable with regard to withdrawing his plea. The court reminded petitioner that his attorney had informed the court earlier that week that petitioner did not wish to withdraw his plea. The court then inquired of defendant personally, whether he wished to withdraw his plea or proceed with sentencing. Petitioner asked to be sentenced and indicated that he specifically did not wish to withdraw his plea. Thereupon, making no further inquiry into the voluntariness or factual basis for the plea, the court sentenced petitioner to a term of five to fifteen years.

Petitioner argues that under the circumstances of the present case, the fact that his initial guilty plea was

entered at a time when he was incompetent voids the actual plea and all proceedings relating thereto under the rule of Pate v. Robinson, 383 U.S. 375 (1966) and McCarthy v. United States, 394 U.S. 459 (1969), and that, furthermore, the actual sentencing was improper because no inquiry was made as to whether petitioner's previous void plea (or his decision not to move to withdraw it) was voluntary, as required by Boykin v. Alabama, 395 U.S. 238 (1969), decided just four days before sentence was imposed.

Such an argument is indeed substantial, and under the exigent circumstances of this case, I am constrained to sustain these contentions.

It is clear that the conviction of a defendant while he is legally incompetent violates due process. Pate v. Robinson, supra; Bishop v. United States, 350 U.S. 961 (1956). Similarly, it is equally clear that in order for a guilty plea to be valid, such a plea must be knowing and voluntary. Kercheval v. United States, 274 U.S. 200 (1927); McCarthy v. United States, supra; United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2d Cir. 1974).

The appropriate standard with regard to a guilty plea is that:

" . . . [I]t must be an 'intentional relinquishment or abandonment of a known right or privilege.'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." McCarthy v. United States, supra, 394 U.S. at 466.

The application of such a standard to the plea of a defendant who is declared incompetent immediately after having been remanded for psychiatric examination upon the basis of his colloquy with the court at the time of the plea manifestly negates the validity of any such plea. As the Supreme Court stated in an analogous situation:

" . . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, supra, 383 U.S. at 384.

Respondent's sole answer to this argument is to attempt to persuade the court that no proof has been adduced that petitioner actually was incompetent at the time of his initial plea, and that, given the time delay between the date of the plea and the psychiatric report -- five weeks -- there is no clear-cut evidence that petitioner was actually incompetent on the day of the plea.

Such an argument is transparent sophistry. Petitioner was remanded for examination because of his bizarre responses at the plea itself. Moreover, the record reveals that he was sent to Bellevue on the very date of the plea. The date of the psychiatric report to the court is merely the date upon which the psychiatrists reported their findings, not the date of their examinations.

Such a psychiatric report, and its subsequent ratification by the court, attesting to a defendant's incompetency, must be interpreted as conclusively invalidating any plea that constitutes a voluntary relinquishment of rights made at a time when a defendant is suffering under such a disability. United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953); United States ex rel. Kaye v. Zelker, 355 F.Supp. 1002 (S.D.N.Y. 1972), aff'd, 474 F.2d 1336 (2d Cir. 1973).

Thus, as any plea that is taken by a defendant at a time when he is incompetent must be treated as a nullity, as is conceded in this case by the respondent, the Court must next consider whether the sentencing court's attempted ratification of the previous guilty plea sufficiently delved into the question of the ratification's voluntariness to meet the standards imposed by Boykin v. Alabama, supra.

The Supreme Court in Boykin specifically enumerated that among the rights waived by a defendant who pleads guilty are the constitutional rights to a jury trial, confrontation by his accusors, and the privilege against self-incrimination. 395 U.S. at 243. The Court stated that waiver cannot be presumed from a silent record, holding that the prerequisites of a valid waiver must appear on the record:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."
>
> Id., at 242

The question of how explicitly a defendant must be shown to have waived these rights is, however, not susceptible of clear-cut definition. While several circuits have held that the record need not reflect that the waiver of the three constitutional rights enumerated in Boykin need be explicit, Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972); Winters v. Cook, 489 F.2d 174 (5th Cir. 1973) (en banc); Todd v. Lockhart, 490 F.2d 626 (8th Cir. 1974); other circuits have held that there must be an affirmative showing of explicit waiver, Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973);

Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); Moore v. Anderson, 474 F.2d 1118 (10th Cir. [illegible]

While this Circuit has not yet specifically ruled on the question, it has seemingly indicated sympathy with the latter interpretation in United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1102 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), wherein the Court stated in dictum that the states would appear to have imposed upon them the requirements of demonstrating voluntariness consonant with Rule 11, F.R.Cr.P. by Boykin.* However, the Court declined to so rule on that occasion on the ground that the guilty plea in question predated Boykin, and the Circuit had previously held it to be non-retroactive. United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970), cert. denied, 404 U.S. 834 (1971).

The facts of the instant case throw the question of non-retroactivity of Boykin into sharp relief, for, while the initial plea occurred some nine months before that decision, the sentencing took place four days afterward. Thus, given the previous incompetency of petitioner, rendering his

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* Cf., United States ex rel. Hill v. Ternullo, ___ F.2d ___, (74-2351, 2d Cir. 2/10/75) at 1756, fn.1.

guilty plea a nullity, this Court must apply Boykin standards in determining whether the purported ratification at sentencing of the earlier plea sufficiently rehabilitated it in order for it to remain vali

Inspection of the sentencing minutes reveals a complete absence of any meaningful inquiry into the voluntariness of petitioner's earlier plea. The sentencing court's sole inquiry was directed to the question of whether petitioner wished to withdraw his earlier plea. Upon the defendant's acquiescence in the earlier plea, the court proceeded without any further inquiry of its own into the original plea's voluntariness or the voluntariness of a now-competent defendant's ratification of a plea made when he was incompetent. No inquiry whatever was made of petitioner at any time during which he was competent as to whether any promises had been made to him, whether he had been coerced, whether he was acting under his own free will either with respect to his invalid plea or his decision not to withdraw it.

Moreover, no inquiry was made of the defendant, now that he was competent, as to whether there was a proper factual basis for his plea. United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974); McCarthy v. U.S., supra.

Respondent argues that petitioner's waiver of the opportunity to make a motion to withdraw his plea at the time of sentencing operates as both a ratification of the earlier plea and a waiver of his objections to that plea's voluntariness, citing United States ex rel. Callahan v. Follette, 418 F.2d 903 (2d Cir. 1969), cert. denied, 400 U.S. 840 (1970).

Such an argument is plainly untenable upon the facts of this case. Callahan concerned a guilty plea, valid on its face, that was being attacked upon the grounds of unfulfilled promises by either the court or the prosecution, a situation in which the defendant clearly has the burden of proof. Callahan was held to have waived any objection to his plea by his failure to take the opportunity afforded by the court for a formal motion and determination of his request for withdrawal.

Furthermore, respondent's suggestion that the 1968 plea minutes in this case be read in conjunction with the 1969 sentencing minutes clearly flies in the face of both Pate v. Robinson, supra, and McCarthy v. United States, supra.

It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to

stand trial, such a plea must be considered null and void, and upon the attainment of competency, he must be given an opportunity to re-plead to the charges.

Furthermore, should the trial court, alternatively, wish to provide a newly-competent defendant an opportunity to ratify his earlier plea, a full and complete inquiry must be made by the court on that later occasion to determine the voluntariness of that ratification, the voluntariness of the plea itself, and further inquiry must once again be made of the now-competent defendant as to whether there is a proper factual basis for the plea.

Applying these principles to the instant facts, it is manifest that no such inquiry as to the voluntariness of the ratification, the plea itself, or any factual inquiry was made of the defendant at the time of sentencing. Thus, if the 1960 plea is deemed a nullity by virtue of defendant's incompetence, the court must look to the sentencing minutes, which are utterly inadequate to make any finding of waiver of rights, pursuant to Boykin.

In attempting to fashion the appropriate remedy in this case, the Court is not unmindful of the fact that in most cases a hearing may be held by the District Court in an attempt to cure the defects of the plea. U.S. ex rel. Leeson v. Damon, supra; Green v. Wingo, 454 F.2d 52, 54 (6th Cir. 1972).

However, a hearing is not always mandated, and there is authority for the Court to hold that an inadequate record alone may justify relief from a guilty plea, Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973); Perry v. Crouse, 429 F.2d 1083 (10th Cir. 1970). This would appear to be the wiser course in this case, dealing as we are with a void guilty plea and a grossly inadequate post-Boykin attempted ratification of that plea. The holding of a hearing in this case in order to flesh out a virtually non-existent record would be an exercise in futility. Rather, petitioner should be given the opportunity, albeit belated, to properly re-plead to the indictments in question.

In light of the foregoing disposition, it is unnecessary for me to decide whether, under any and all circumstances, the failure of a sentencing court to hold a competency hearing, sua sponte, where none has been requested, and where the record at the time of sentencing did not indicate that the petitioner was manifesting any psychiatric symptomotology, violated due process.

Suffice it to say, Pate v. Robinson, supra, does not mandate a competency hearing regardless of the evidence and whether or not the defendant requests one. United States ex rel. Evans v. LaVallee, 446 F.2d 782 (2d Cir. 1971);

United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d Cir.), cert. denied, 408 U.S. 927; United States ex rel. Curtis v. Zelker, supra.

Upon careful scrutiny of this record as well as petitioner's failure to particularize in what way he was prejudiced by this omission, the sentencing court's refusal to hold a competency hearing, sua sponte was well within the proper exercise of its discretion.

Accordingly, petitioner's plea of guilty is vacated, and the writ of habeas corpus shall issue sixty days from the date of this opinion, unless within that time petitioner is allowed to re-plead in the State court upon the indictments in question.

The Court wishes to express its appreciation to Judson A. Parson, Jr., Esq., assigned counsel, for his assistance in this case.

Kevin Thomas Duffy
U. S. D. J.

Dated: New York, New York
February 25, 1975.

APPENDIX

The Court: You are not sorry at all that you did any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.

The Court: No matter what you do?

The Defendant: No matter what I do.
(Plea minutes, pp. 17-18).

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

APPENDIX - continued

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.
(Id. at pp. 19-20).

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be --- whom are you mad at?

The Defendant: No one.
(Id. at p. 21).